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IN THE

Supreme Court of the United States

October Term, 1966

No. 886

JOHN CHULICK,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK STATE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT

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Petitioner prays that a writ of certiorari issue to review the order of affirmance of the judgment below by the Appellate Division of the New York State Supreme Court, Fourth Judicial Department.

Opinions Below

The memorandum opinion of Special Term of the New York State Supreme Court, Erie County, directing the striking of allegations in the complaint alleging violations of the Federal Safety Appliance Act, is unreported and is printed in the Appendix hereto, *infra*, P. 19. The opinion of the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, affirming

this order, printed in the Appendix hereto, *infra*, P. 21, is reported at 13 A. D. 2d 889, 215 N. Y. S. 2d 262. The order of the Appellate Division denying petitioner's motion for leave to appeal to the New York Court of Appeals from this order is reported at 14 A. D. 2d 511, 218 N. Y. S. 2d 491. The judgment of the New York State Supreme Court in favor of the respondent is unreported and is printed in the Appendix hereto, *infra*, P. 22. The order of the Appellate Division, Fourth Judicial Department, affirming this judgment is reported at ___ A. D. 2d ___, 272 N. Y. S. 2d 127 and the order of the New York Court of Appeals denying petitioner's motion for leave to appeal to the Court of Appeals from this judgment is reported at 18 N. Y. 2d 578. There were no opinions accompanying any of these determinations other than those mentioned herein.

Jurisdiction

The judgment of the New York State Supreme Court was entered on October 2, 1963. The judgment was affirmed by order of the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, entered June 17, 1966. Application for leave to appeal to the Court of Appeals of New York was denied by order of the New York Court of Appeals dated September 22, 1966. The jurisdiction of this Court in invoked under 28 U. S. C. § 1257.

Questions Presented

1. Is the Safety Appliance Act inapplicable as a matter of law, where an accident physically occurs on a shipper's tracks, rather than on the line of a common carrier, despite the factual circumstances involved?

2. Assuming, *arguendo*, that the Safety Appliance Act is not applicable for the purpose of affixing negligence *per se*, is it also irrelevant for the purpose of setting up a standard to be complied with?

Statute Involved

45 U. S. C. § 2, the Safety Appliance Act

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Statement of Case

(All references are to pages in the Record except where indicated otherwise.)

Facts

This is a suit involving the Federal Safety Appliance Act. The basic facts, which are not in dispute, are as follows:

Petitioner, on the date of the accident, was employed as a switchman by the Semet Solvay division of Allied Chemical & Dye Corp. near Buffalo, New York (85). Semet Solvay maintained railroad tracks and employed crews in connection with its manufacturing operations. Semet Solvay did not inspect any railroad cars nor make repairs, and had neither crews nor facilities for inspection or repair (44, 115). All inspection and repair was performed by New York Central Railroad Company, whose main east-west line and Harriet Yards were just to the north of Semet Solvay's tracks (25-26, 44, 159).

It was the custom and practice for New York Central to deliver and leave loaded and empty cars destined for Semet Solvay on Semet Solvay's receiving tracks (29, 168). New York Central delivered these cars by going in and out the east and west New York Central leads connecting with these tracks.

After delivery, these cars were weighed by Semet Solvay crews. A crew performed the weighing operation by coupling cars to the front end of their engine, backing up while pulling the cars to the Semet Solvay scale track and pushing the cars forward into the scale house (93-95). After weighing each car, the car was released, the engine backing off the scale track and passing around the scale house on the dead track to pick up the cars after all were weighed (96).

On the night of the accident, petitioner was part of a three man crew engaged in weighing some cars which had that evening been delivered by New York Central (31, 88-89, 168). The crew was working the 11:00 P. M. to 7:00 A. M. shift (87-88). Six cars in all had been delivered: three low side gondolas, two Semet Solvay tank cars and one Delaware, Lackawanna & Western box car (107, 139).

Following the weighing, in accordance with the established procedure, petitioner's crew took the engine around on the dead track to pick up the string of cars just weighed (142). All of them but the last, the box car, coupled with no difficulty (97). Three times they tried to couple with the box car, without success (100).

Finally, petitioner went between the box car and the next to the last car, one of the two tank cars, in order to, by "tickling," make the coupling by getting the pin on the tank car to drop (100-102). There was a company rule

against going between cars when cars were moving but the rule did not prohibit going between cars when stopped; in fact, it was the established custom and practice to go between cars for this purpose (41, 64). The cars here were stopped and the box car was about one and a half car lengths away (101).

While petitioner was so engaged, the box car rolled forward, crushing petitioner's leg against the tank car (103). It was a dark night and the car rolled forward without making any noise (104). The accident took place between the roundhouse switch and the repair track switch on the tracks of Semet Solvay (64-66, 121-122). Several days later, as a consequence of the accident, it was necessary to amputate petitioner's leg (109, 111).

How Federal Question Is Presented

Petitioner first raised the federal question involved, violation of the Federal Safety Appliance Act, in his complaint, alleging, in paragraph Twenty-Sixth thereof (R., viii-ix):

> "That the defendant New York Central Railroad violated the Safety Appliance Act (title 45 of the U. S. Code) which violation was a proximate cause of the plaintiff's injuries."

These allegations were ordered stricken from the complaint by order of Special Term, Erie County. The memorandum opinion of Special Term which supported this order is printed in the Appendix hereto, *infra*, P. 19. [The complaint also contained allegations of violations of the Safety Appliance Act by another carrier, Delaware, Lackawanna & Western Railroad Company, but these allegations were abandoned as to that carrier following this motion and the complaint was subsequently dismissed as to Allied Chemical & Dye Corp.]*

* It is undisputed that Allied Chemical & Dye Corp. was not a common carrier but was a shipper, the complaint being dismissed as to Allied Chemical & Dye Corp. and the Safety Appliance Act being inapplicable to it for this reason.

This order was affirmed by the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, and the Appellate Division also denied petitioner's motion for leave to appeal from this order to the New York Court of Appeals (see Citations to Opinions Below, *supra*).

This federal question was again raised at the outset of the trial of this action. The first statement made by petitioner's counsel to the trial court was that the case involved the applicability of the Safety Appliance Act (4-7). Petitioner's counsel at that point moved to restore these allegations as to violation of the Safety Appliance Act by New York Central to the complaint but the trial court denied this motion (12-14). Petitioner's counsel again moved to allow amendment of the complaint to allege the Safety Appliance Act against the respondent at the end of petitioner's proof (247). This motion also was denied (252). Finally, at the end of the trial, petitioner's counsel requested a number of charges to the jury concerning the Safety Appliance Act; each of these charges was denied by the trial court and each of the denials was excepted to by petitioner's counsel (326-333).

Upon judgment being entered in favor of the respondent, appeal was taken by the petitioner to the Appellate Division, Fourth Judicial Department. Upon this appeal, which was limited solely to the question of the applicability of the Safety Appliance Act, the Appellate Division affirmed the judgment below. Petitioner timely moved the New York Court of Appeals for leave to appeal to that court, also on the sole question of the applicability of the Safety Appliance Act (see Application for Leave to Appeal to the Court of Appeals) but this motion was also denied (see Citations to Opinion Below, *supra*).

Reasons for Granting the Writ

1. The decisions of the courts below constitute an erroneous and restrictive interpretation of a federal statute contrary to the interpretation given the statute in other states and circuits. These rulings represent the first instance, in any jurisdiction, where the mere location of the accident has been held to bar the application of the Federal Safety Appliance Act despite the surrounding factual circumstances.

The Safety Appliance Act is a federal penal statute imposing fines upon common carriers by rail for violations of its requirements. The section here involved is Section 2 of the statute which makes it unlawful for a common carrier to haul or permit to be hauled or used on its line a car not equipped with couplers coupling automatically by impact. The cases affix negligence *per se* against the offending carrier where an injury results from its breach.

The Safety Appliance Act was passed in an effort to remedy the terrible loss of life and limb suffered by railroad workers. The legislative history of the act reveals that, of the 153,235 railroad employees directly engaged in train service in June, 1890, 1,459 were killed and 13,172 injured during the following year, or one of every 105 killed and one of every 12 injured. S. Rep. No. 2915, 52d Cong. 1st Sess. 1049 (1892). The Safety Appliance Act, when finally passed in March, 1893, was interpreted from the outset as imposing negligence *per se* on a railroad for violation of the act where injury or death was sustained. *Chicago, R. I. & Pac. R. R. v. Brown*, 229 U. S. 317 (1913). The cases held that the fact that the couplers may have functioned properly on all previous occasions was irrelevant; the railroad is liable if the equipment does not proper-

ly function on the occasion in question. *Affolder v. New York C. & St. L. RR.*, 339 U. S. 96 (1950). The act was not limited to railroad employees but extended to *anyone* who might be injured by a railroad's non-compliance with the act. *Urie v. Thompson*, 337 U. S. 163, 191 (1948).

It is well settled that the Safety Appliance Act, as a remedial statute, must be given a liberal interpretation. *Johnson v. Southern Pac.*, 196 U. S. 1 (1904). As was said (at 303) in *Geraghty v. Lehigh Valley R. R.*, 70 F. 2d 300 (2d Cir., 1934), "* * * the acts are to be liberally construed in order to effectuate the legislative purpose to extend the regulation to the utmost limits of congressional power."

Petitioner was injured under the exact circumstances which Section 2 of the Safety Appliance Act was designed to prevent: going between railroad cars to effect a coupling *Johnson v. Southern Pac.*, 196 U. S. 1 (1904) at 19. As was said in the recent case of *United States v. Southern Railway Company*, 341 F. 2d 669, 671 (4th Cir., 1965):

> "The specific purpose of Sec. 2, evident in its language as well as in its legislative history, was to minimize the necessity of having men pass between the cars * * * Elimination of the need to have men between the cars to uncouple them or to perform the basic coupling operation maferially reduced the hazard which had resulted in a major portion of the deaths which had aroused the Congress."

Despite these authorities, the courts below held that the act was not available to petitioner because the injury was not sustained on the "line" of New York Central; that is, since the New York Central was not hauling or actually using the car *on its own line* at the time of the injury, as a matter of law the act was held inapplicable.

A long line of cases have held to the contrary, however, extending liability under the act to cover situations where

the injury did not *physically* occur on the railroad's line. Thus, in *Philadelphia & R. Ry. v. United States*, 191 Fed. 1 (3rd Cir., 1911), the court held that the tracks of a second railroad are part of the first railroad's line, for purposes of the act, where the first railroad operates its engines and crews over the second railroad's tracks by agreement between the two railroads. *Gray v. Louisville & W. R. R.*, 197 Fed. 874 (E. D. Tenn. 1912) held to the same effect, the court ruling that it would not allow the act's "undoubted humanitarian purpose [to be] frittered away by judicial construction" (at 876). In *Lovett v. Kansas City Term, Ry.*, 316 Mo. 1246, 295 S. W. 89 (1927), liability was extended to cover the case of a defective car operated by a railroad over tracks owned by a private shipper. In *Rush v. Thompson*, 358 Mo. 568, 202 S. W. 2d 800 (1947), twenty miles of track built and owned by the Federal Government, over which the railroad had contracted to operate, was considered part of the line of the railroad so as to make the railroad subject to the act.

As the court in *Rodgers v. Conemaugh & B. L. R. R.*, 137 F. Supp. 467 (W. D. Penn. 1956) said in holding the act to apply against the carrier despite the fact that the injury occurred on tracks owned by the shipper (at 469):

> "To accept defendant's thesis to invoke the provisions of the Safety Appliance Act would require actual ownership of the tracks upon which the movement is situated at the time of accident, would, in my judgment, stultify and render impotent the application of this most vital law."

In each of these cases the factual circumstances involved were considered paramount in determining whether or not the act was applicable.

Here, what is of most significance is that the determination as to the act's inapplicability was made *in advance* of

the trial of this action, on the sole ground that the accident did not *physically* occur on the tracks of New York Central. In fact, *the Special Term ruling was the first in any state or federal court whereby the Safety Appliance Act was stricken from a plaintiff's complaint without affording the plaintiff the opportunity to present evidence of its applicability.* And by reason of the Special Term ruling, and the affirmance of this ruling by the Appellate Division, it was thereafter impossible to secure a serious consideration of the act's applicability, taking into account the surrounding factual circumstances, from the courts which subsequently heard this case.

We submit that because of these decisions below, an unwarranted limitation on the effectiveness of this remedial statute has been introduced, completely at variance with the interpretation and application accorded the statute in other states and circuits.

2. The decisions of the courts below raise an important question of federal law which has not been settled by this Court. That question involves the limits of responsibility between a common carrier and a shipper in light of the Safety Appliance Act. Even if, *arguendo,* the trial court and the Appellate Division on the second appeal examined this question independently and did not feel constrained to follow the pretrial determination of Special Term, this question was nevertheless determined erroneously and in a manner contrary to the liberal intendment of Congress.

Just what the limits of responsibility between the two are has never been resolved by this Court. Three lower court cases did attempt to answer the question however. These cases were *Paul v. Duluth, Missabe & Iron Range Ry.,* 96 F. Supp. 578 (D. Minn. 1950), *Risberg v. Duluth, M. & I. R. Ry.,* 233 Minn. 396, 47 N. W. 2d 113 (1951), cert.

denied 342 U. S. 832 (1951) and *Patton v. Baltimore & O. R. R.*, 197 F. 2d 732 (3rd Cir., 1952). The crux of these decisions was that although the Safety Appliance Act places an absolute duty on a railroad, this duty ends when another railroad assumes it. Since the shipper in each of these cases had its own system of tracks and its own engines and crews, and since the shipper by performing its own inspection, maintenance and repair, itself undertook to safeguard its employees, the shipper was in effect treated as another railroad, relieving the common carrier of its responsibility under the act. That the shipper did "like other railroads, inspect and repair cars," was specifically referred to in the *Patton* case. 197 F. 2d 732, 740. As was said in the *Risberg* case (at 403), in such a situation, the common carrier's liability terminates, the shipper "for the sake of argument * * * considered another railway company." The furthest these cases can take us then is to a rule that where a shipper performs the functions of a railroad, it is no longer relying on the carrier's compliance with the act but is itself undertaking to safeguard its employees, thereby relieving the carrier of its responsibility under the act.

This rule is consonant with that enunciated by this court in *Brady v. Terminal R. R. Ass'n*, 303 U. S. 10 (1938). In *Brady*, the defendant carrier hauled a string of freight cars over its own line and left them on the receiving track of a connecting carrier, where they then stood temporarily while being inspected by an employee of the connecting carrier to determine whether they should be accepted by the latter for further transportation. While conducting this inspection, the employee was injured by the failure of a safety appliance required by the act. This court held that even though the injury was sustained on the tracks of the second carrier, the first carrier was nevertheless

liable under the act. The Court reasoned that the responsibility of the first carrier continued, since at the time of the accident the second carrier had not accepted the cars. This decision was well in line with the congressional intent that the duty of a railroad under the act may be ended by a second railroad's assuming it, but that until this is done, the first railroad remains liable.

The courts below, erroneously interpreting the *Paul, Risberg* and *Patton* cases, in effect held that the mere fact that the accident happened on the tracks of the shipper was sufficient to absolve New York Central Railroad Company from responsibility.

This was despite the uncontroverted proof that the two functions essential to accord workmen the protection Congress intended—those of inspection and repair—were not performed by Semet Solvay at all, but by New York Central Railroad Company (43-44, 115-116, 154) and unlike the shippers in the *Paul, Risberg* and *Patton* cases, the shipper here was not therefore "another railroad company."

In sum, this Court should settle any question there might be concerning the absolute duty which the Safety Appliance Act places on a common carrier by rail. Violation of the statute takes place when a railroad hauls or permits to be hauled or used on its line a defective car. Unless another railroad's liability intervenes, this violation may be resorted to, to establish negligence *per se* against that railroad, wherever a death or injury resulting from the violation occurs. Where a shipper performs the duties of inspection and repair, the shipper is acting like another railroad company, and the carrier is relieved of its responsibility under the act. Where, however, as here, a shipper does not carry on any inspection or repair but relies upon

the carrier for the performance of its duty of providing safe cars, this court should hold that the shipper and its employees are entitled to the protection of the statute.

3. Aside from their novelty, the questions raised here are of importance to a considerable number of persons other than the parties litigant. By the restrictive interpretation accorded the statute below, thousands of others, similarly situate as petitioner, will be deprived of the protection Congress intended them to have in enacting the statute.

It is submitted that the practical effect of the decisions below is that in each action in which the defendant does not admit the applicability of the Safety Appliance Act, the act may be stricken, on motion, from the pleadings. Thus, in large measure the Safety Applicance Act and its benefits are eradicated, entailing serious consequences to all persons injured by violations of the Safety Appliance Act in the future.

Even if we were to assume that the trial court and the Appellate Division did not blindly follow the pretrial determination of Special Term, the restrictive interpretation accorded the statute by the decisions below was still such as to greatly eradicate the benefits of the Safety Appliance Act.

The Safety Appliance Act was enacted by Congress in order to protect workmen like petitioner who are compelled to use railroad cars furnished by the carrier and to rely upon the carrier's compliance with the statute. To hold that the statute is inapplicable because the accident occurred on the shipper's tracks, rather than on the tracks of the carrier, in a situation in which the shipper neither undertook nor performed either inspection or repair, would

emasculate the statute enacted for the benefit of such workmen. All of the thousands of other workmen such as petitioner suffer by this restrictive and erroneous interpretation.

4. Assuming, *arguendo,* that the Safety Appliance Act was not applicable for the purpose of affixing negligence *per se,* the courts below were nevertheless in error in not permitting reference to the statute as a standard to be complied with. In so doing, the courts below determined this question contrary to the rulings of this Court.

On the first appeal, the Appellate Division, although refusing to reverse Special Term's ruling, did leave to the trial court to determine the question of whether the Safety Appliance Act did not apply as setting the *standard* to which a carrier must comply. In the words of the Appellate Division (see Appendix, P. 21):

> "In affirming the order, we do not pass upon the question of whether proof should be admitted upon the trial that the equipment on the car failed to comply with the standard set up by the Safety Appliance Act, as bearing upon the cause of action for common-law negligence."

At the trial, petitioner requested the court to so charge, asking that the court instruct that the standard be that the couplers couple automatically by impact on the occasion in question (330-31, 333). This request to charge was refused by the trial court, which refusal, we submit, was error and constituted a further crippling of the efficacy of this statute.

It is well established that where the statute defines the standard of care and the safeguards required to meet a recognized danger, then no other measure may be applied in determining whether a person has carried out the duty of care imposed by law. Failure to observe the standard

imposed by statute is negligence as a matter of law. *Tedla v. Ellman*, 280 N. Y. 124, 19 N. E. 2d 987 (1939); *cf. Union Pac. Ry. v. McDonald*, 152 U. S. 262 (1894).

Thus, *Martin v. Herzog*, 228 N. Y. 164, 126 N. E. 814 (1920) involved a statutory requirement for lights on vehicles using the state highways. Judge Cardozo, writing for the court, held that the unexcused omission of statutory signals is more than some evidence of negligence; it is negligence. Without anything more, such violation establishes negligence *per se*, and if this was the proximate cause of the injury, there is liability.

As we have seen, this also is the rule with respect to the Safety Appliance Act. The action establishes a standard to which the railroads must adhere. It imposes an absolute duty on the carrier to comply with the act by having efficient safety appliances. Violation of the statute, without more, imposes negligence *per se* on the carrier. *Chicago, R. I. & Pac. R. R. v. Brown*, 229 U. S. 317 (1913).

This standard having been established, it is proper that this standard be referred to, whether or not the act applies.

The respondent however contends, by reason of the fact that the accident did not physically occur on respondent's tracks, that the act cannot be referred to for any purpose. Without question, if the injury had occurred just a relatively few yards away, on the tracks of New York Central, the statute would have applied both in its penal effect and as establishing negligence *per se*. In some fashion, according to the respondent, the difference of these few yards not only deprives the act from its effect as establishing negligence *per se*, but also makes it non-persuasive and completely irrelevant, even as setting a standard of care.

This logic escapes the petitioner and would strip the court of highly significant and well established standard of

reference.. It can hardly be argued that the statutory requirement involved in *Martin v. Herzog,* 228 N. Y. 164, 126 N. E. 814 (1920), would not even have been relevant had that accident occurred off the public highway. Nor would a Vehicle and Traffic Law requiring some safety device to be installed on automobiles which use the state highways be irrelevant, where non-compliance results in an accident, simply because that accident occurs off the highway. A court in such a case would properly rule that the statute indicated what constituted reasonable care, and that violation of this statutory standard could, at the least, be looked at as *evidence* of negligence.

This court in *Kernan v. American Dredging Co.,* 355 U. S. 426, 438-39 (1958) decided this very question. There the court held, as regards the Jones Act, that where conduct falls short of the high standard required by the statute and causes injury, liability ensues whether predicated on the remedy of the statute itself or on general principles of negligence. In so ruling, the court stated that the same broad principles would have been invoked had the Safety Appliance Act been before it. That is, the statutory *standard* is looked to regardless of the act's applicability.

It is submitted that irrespective of whether or not the act is applicable for the purpose of fixing negligence *per se,* it at least should be referred to as setting the standard which the carrier must comply with. The standard established by the act is no more and no less than that the couplers perform on the occasion in question without regard to the normal efficiency of the couplers. *Affolder v. New York C. & St. L. R. Co.,* 339 U. S. 96 (1950). The jury here should have been permitted to draw an inference of negligence on the part of New York Central just by reason of the fact that the cars did not couple. Contrary

to the instructions of the trial court, proof of failure of inspection or of a defect in the cars should not have been required. In enacting the statute, Congress sought to eliminate such problems of proof. The court, as requested, properly should have charged the respondent's duty under the act and instructed that, by reason of respondent's failure to adhere to the statutory standard, that is, by the failure to couple, the jury, without more, could infer negligence. In refusing to so charge, we submit that the courts below compounded their errors of interpretation and went even further in depriving workmen such as petitioner of the protection of the statute.

5. Arguments by respondent attempting to make the issues here merely procedural, and nonfederal, are without merit. Respondent argued in the Appellate Division that the petitioner failed to establish his cause of action and the complaint should have been dismissed. Respondent based his contention on the fact that the amended complaint alleged that the car that caused the injury was a Delaware, Lackawanna & Western car, whereas the proof established that it was a Semet Solvay tank car.

The short answer to this, of course, is that the respondent moved to dismiss on this ground at trial and this motion was denied by the trial court (257, 262, 336). The respondent did not appeal from this denial and therefore cannot raise this issue here.

Even if this had not been the case, however, the petitioner corrected any defect by moving to amend the complaint to conform to the proof (264). It is too well settled in New York to require extensive citation of authority that there is great liberality in allowing amendments even at trial so long as there is no prejudice to the other party. *Stack v. Royal Sheet Metal Works*, 42 N. Y. S. 2d 662

(1943), Here, there certainly could have been no surprise or other prejudice to the respondent, for the respondent knew as early as 1952, from the petitioner's own testimony on examination before trial (R. 266-74) that the Semet Solvay tank car caused the injury. Failure to earlier amend the complaint was a mere oversight and the trial court was wrong in disallowing amendment at trial.

Most importantly, however, the question as to which car caused the injury is immaterial. The obligation of New York Central under the statute was to furnish cars that coupled automatically. It does not matter which car failed to couple. The proof shows (and the complaint alleges) that New York Central furnished both. Whether the amendment was granted or not is unimportant for New York Central in any event violated the statute.

By reason of the above, and contrary to what the respondent may here assert, there are no nonfederal grounds adequate to support the judgment below, the judgment resting solely on the federal grounds involving the applicability of the Safety Appliance Act.

Conclusion

For all of the reasons herein stated, this case is a peculiarly appropriate one for the exercise of this court's discretionary jurisdiction and this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WAYNE D. WISBAUM,
EDWARD H. KAVINOKY,
Counsel for Petitioner.

Dated: December 15, 1966.

APPENDIX

Opinions and Judgment Below

Memorandum Opinion of Special Term of the New York State Supreme Court, Erie County, directing the striking of allegations in the complaint alleging violations of the Federal Safety Appliance Act.

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ERIE

JOHN CHULICK,

Plaintiff,

vs.

ALLIED CHEMICAL & DYE CORP., DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY and NEW YORK CENTRAL RAILROAD COMPANY,

Defendants.

William J. Brock for Plaintiff.

Hodgson, Russ, Andrews, Woods & Goodyear for the Defendant, Delaware, Lackawanna & Western Railroad Company.

Brown, Kelly, Turner & Symons for Defendant, New York Central Railroad.

NOONAN, J.

There are here being considered two motions which are for all practical purposes identical. The defendant, Delaware, Lackawanna & Western Railroad Company, moves for an order striking from the complaint herein paragraph

numbered "Thirteenth" thereof as irrelevant and unnecessary, and the defendant, New York Central Railroad, makes a similar motion with respect to paragraph numbered "Twenty-sixth" of the same complaint. Each of these paragraphs allege in substance that the respective defendants violated the Safety Appliance Act (Title 45 of the U. S. Code) which violation was a proximate cause of the plaintiff's injuries. The only Section of the Safety Appliance Act which could be involved under the plaintiff's complaint is that one having to do with automatic couplers. That Section provides as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The plaintiff's complaint on its face makes it clear that the car involved in this accident was not being hauled or used on the line of either of these defendants but rather was being hauled and used on the line of a third defendant, the Allied Chemical & Dye Corp. The cases cited by the plaintiff and upon which he relies have no application for in each of them the car involved in the accident was being hauled upon the defendant's line. A simple reading of the Section of the Safety Appliance Act itself and the cases interpreting that Section lead to the inescapable conclusion that the motions in each instance must be granted.

Submit orders accordingly without costs.

Dated: September 30, 1953.

ROBERT E. NOONAN,
Supreme Court Justice.

Opinion of the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, affirming the Order of Special Term directing the striking of allegations in the Complaint alleging Violations of the Federal Safety Appliance Act.

JOHN CHULICK,

Appellant,

v.

ALLIED CHEMICAL & DYE CORPORATION,

Defendant,

and

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *et al.*,

Respondents.

Order unanimously affirmed, with $25 costs and disbursements.

Memorandum: In affirming the order, we do not pass upon the question of whether proof should be admitted upon the trial that the equipment on the car failed to comply with the standard set up by the Safety Appliance Act, as bearing upon the cause of action for common-law negligence (Appeal from Order of Erie Special Term granting motions by two defendant railroad companies to strike out allegations in the Complaint). Present—Williams, P. J., Bastow, Goldman, Halpern and Henry, JJ.

Judgment of the New York State Supreme Court in favor of the respondent.

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ERIE

JOHN CHULICK,

Plaintiff,

vs.

ALLIED CHEMICAL & DYE CORP., DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY and NEW YORK CENTRAL RAILROAD COMPANY,

Defendants.

This cause having come on for trial before the Hon. Michael Catalano, J. S. C., and a jury at a trial term of the Supreme Court on the 17th day of May, 1963, all parties having appeared by counsel and the issues having been duly tried and

The Erie-Lackawanna Railroad Company, successor in interest to the defendant, Delaware, Lackawanna and Western Railroad Company, having moved at the close of the plaintiff's case and again at the close of all the evidence for a dismissal of the complaint herein, and said motion having been granted at the close of all the evidence, and

The defendant, New York Central Railroad Company, having moved at the close of the plaintiff's case and again at the close of all the evidence for a dismissal of the complaint herein, and said motion having been denied, and

Trial thereupon having proceeded and the jury having duly rendered a verdict in favor of the defendant, New York Central Railroad Company,

Now, on motion of Hodgson, Russ, Andrews, Woods & Goodyear, attorneys for the Erie-Lackawanna Railroad Company, successor in interest to the defendant, Delaware, Lackawanna and Western Railroad Company and Vaughan, Brown, Kelly, Turner & Symons, attorneys for the defendant, New York Central Railroad Company,

It is hereby ORDERED, ADJUDGED and DECREED that the defendants herein have judgment dismissing the complaint, that the Erie-Lackawanna Railroad Company, successor in interest to the defendant, Delaware, Lackawanna and Western Railroad Company recover of the plaintiff the sum of $119.80 costs, as taxed, and that the defendant, New York Central Railroad Company recover of the plaintiff the sum of $115.00, costs as taxed, and that said defendants have execution therefor.

Dated: October 2, 1963.

ROBERT W. GRIMM,
Clerk.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 886

JOHN CHULICK,
Petitioner,

v.

NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK STATE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

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BATAVIA TIMES, LAW PRINTERS,
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STATUTE.

Federal Safety Appliance Act 1, 6, 7, 3

IN THE

Supreme Court of the United States

October Term, 1966

No. 886

JOHN CHULICK,

Petitioner,

v.

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK STATE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

Question Presented

Absent proof of any defect of the coupler of the Delaware, Lackawanna & Western car, specifically pleaded as "the car which caused the injury to the plaintiff", was it error for the Trial Court to refuse to charge either the applicability of the Federal Safety Appliance Act, or the provisions thereof as a standard of care?

Statement

Appellant's amended complaint states in part, and to the extent material:

That on December 11, 1949 plaintiff was pinned between two cars at the Semet-Solvay Plant and sustained serious injuries (R. Page V, Paragraph Third, Complaint).

That the car which caused the injury to the plaintiff was owned by the defendant Delaware, Lackawanna & Western Railroad Company (R. Page V, Paragraph Fourth, Complaint).

That at the time and place of said injury to the plaintiff, *said car* had a defective coupler (R. Page V, Paragraph Fifth, Complaint).

That said cars were furnished by the defendant New York Central Railroad Company (R. Page VII, Paragraph Eighteenth, Complaint).

That the defendant New York Central Railroad Company had the duty of inspecting the cars which it delivered (R. Page VIII, Paragraph Nineteenth, Complaint).

That the defendant New York Central Railroad knew or should have known of the defective condition of *said car* (R. Page VIII, Paragraph Twentieth, Complaint).

Paragraphs Twenty-first, Twenty-second, Twenty-third each refer to "said car" (R. Page VIII).

That the defendant New York Central negligently allowed *said defective car* to be put into or continued in use; that this defendant failed to make or improperly and negligently made inspections of *said car* (R. Page VIII, Paragraph Twenty-fifth, Complaint).

That said defective car and coupling constituted, etc. (R. Page IX, Paragraph Twenty-seventh, Complaint).

(Emphasis has been supplied above.)

Facts

On December 11, 1949 plaintiff was employed as a switchman by Semet-Solvay (R. 85-86).

Semet-Solvay operated its own rail facilities (R. 30; 90).

The plaintiff and his crew had put a string of cars through the scale house, cutting them off one at a time to let them run down an incline, after which the crew began to couple them up in a string, all on Semet-Solvay's tracks (R. 94, 95).

Chulick was injured while between a tank car owned by his employer, Semet-Solvay and a boxcar owned by the Delaware, Lackawanna & Western Railway Company, and while in the course of his employment, attempting to couple up a string of cars (R. 95; 99; 101-3).

The cars failed to couple because the pin would not drop on the coupler of the Semet-Solvay tank car (R. 100).

The coupler on the Delaware, Lackawanna & Western car was locked in a closed position at all times (R. 125), was never seen nor inspected by the plaintiff (R. 125), the cut off lever was not touched or operated (R. 128), the cars' couplers came together properly, but the coupler of the tank car would re-open (R. 130), that everything on the movement worked properly except the coupler on the tank car (R. 133; 206-270).

The testimony of the other factual witnesses may be summarized as to what car or what defect might have been involved:

Charles Dunford, a fellow employee, was not on duty at the time of the accident (R. 23), inspected the Semet-Solvay tank car and the Delaware, Lackawanna & Western boxcar several hours after the accident (R. 36, 38-39), finding no defect whatsoever (R. 39, 48-51).

Cyril McDermott, a fellow employee, engineman of the plaintiff's crew, had no occasion to look at either coupling (R. 149).

Wasco Guize, a fellow employee and the conductor on the job, made no inspection of the cars after the accident (R. 170), but made the coupling thereafter without difficulty (R. 171; 175; 182; 280-285).

Alfred B. Turner, New York Central car inspector, inspected both cars some hours later (R. 192), found a defective handbrake, but testified that the couplers were in good order (R. 217-218), on the Delaware, Lackawanna & Western car, and on the Semet-Solvay tank car, which had worn but proper couplers (R. 223-224).

ARGUMENT

1. The complaint alleges with singular particularity that the car that caused the injuries was a Delaware, Lackawanna & Western car and that it had a defective coupler.

There is no allegation in the complaint that any other car had a defect of any kind.

The complaint contains no general allegation of negligence but is, as noted above, unusually specific, being directed to the Delaware, Lackawanna & Western car only.

The amended complaint upon which the case came to trial was verified by the plaintiff on August 11, 1950 (R. 129).

The plaintiff testified by deposition before trial on December 9, 1952 and at that time swore that the only defect lay in the Semet-Solvay tank car. At the same time he swore that the Delaware, Lackawanna & Western coupler functioned as intended (R. 266-274).

On the trial the plaintiff testified in a manner consistent with his pre-trial testimony and said that he had read over his deposition prior to the trial and that he had made the answers there recorded (R. 128-129).

Summarizing the proof on trial, we find:

That the failure to couple was because the pin did not drop on the coupler of the Semet-Solvay tank car (R. 125).

That the coupler of the Delaware, Lackawanna & Western car was locked in position at all times (R. 125).

That the plaintiff did not inspect the coupler of the Delaware, Lackawanna & Western car (R. 125).

That everything worked properly, except the coupler of the Semet-Solvay tank car (R. 133; 226-274).

That the witness Dunford examined both cars a few hours after the accident and found no defects (R. 36-51).

That the witness McDermott had no occasion to look at the coupler (R. 149).

That the witness Guize made no inspection of the cars but, immediately after the accident, coupled the cars without difficulty (R. 170-182; 280-285).

That the witness Turner examined the cars the same day, some hours later, but no defects in the coupler were found (R. 223-224).

It is respectfully submitted that the plaintiff failed to make out the only cause of action set forth in his complaint, *i.e.* that the car which caused his injury was a Delaware, Lackawanna & Western car which had a defective coupler.

2. A charge concerning the Safety Appliance Act could only have become relevant once there was proof that the Delaware, Lackawanna & Western car had a defective coupler.

There was no such proof. Indeed the proof showed that the Delaware, Lackawanna & Western coupler functioned as intended.

Under these circumstances the provisions of the Safety Appliance Act had nothing to do with this case and were truly irrelevant or immaterial.

Under these circumstances the request was properly refused and the refusal will not support a claim of error.

Under the peculiar circumstances of this case where the plaintiff elected as early as December 9, 1952 to testify in contradiction of the complaint which he had verified some time before, and where 11 years later in May of 1963, plaintiff and his counsel proceeded to trial upon the same complaint, it is respectfully submitted that the question of the applicability of the Safety Appliance Act to the operation in which the plaintiff was engaged at the scene of his accident, or the availability of the Safety Appliance Act as a standard of care, does not come into play.

There is no suggestion in the complaint that any defect other than the coupler of the Delaware, Lackawanna & Western car was the subject of the action.

There was no testimony critical of the Delaware, Lackawanna & Western coupler at any time.

It is respectfully submitted that the question of the Safety Appliance Act is immaterial and irrelevant and the Court properly refused to charge it in any respect.

3. The Courts below did not make a determination, as a matter of law, which was related to an accident occurring on a shipper's tracks as Petitioner suggests in his question Number 1, Page II, Petition.

The question of a "shipper's track" never arose, and never became an issue. The determination of Special Term and of the Appellate Division on the 1961 appeal related to an alleged defective car which had been turned over to another railroad.

At the time (1953) that the Special Term struck the allegation of a violation of the "Federal Safety Appliance Act" (Paragraph Twenty-six, Amended Complaint, Page VIII, Record), the Petitioner was asserting that his employer, Allied Chemical & Dye Corp., was engaged in operating a railroad, and was violating the Federal Safety Appliance Act (Amended Complaint, Paragraphs Thirty-seven, Thirty-eight, Page X, Record).

Accepting the Petitioner's allegations as true, both the Special Term (in 1953) and the Appellate Division (in 1961) correctly ruled out the claim of violation of the Federal Safety Appliance Act, for on the Petitioner's own pleading, the alleged defective car had passed out of the control of Respondent and was in the hands of a receiving railroad. Both the Special Term and the Appellate Division correctly applied the law to Petitioner's Complaint as the record then stood.

4. Petitioner testified on examination before trial in 1952 that the Delaware, Lackawanna & Western car was not defective. Petitioner in 1961 argued his appeal from the 1953 order of Special Term although the Special Term had later in 1953, dismissed the action as against Petitioner's employer.

Petitioner brought the case on for trial in 1963 having made no motion to amend in the 13 years that the case was pending.

Petitioner's failure to plead any defect in the car belonging to his employer, coupled with his failure to show any defect in the car specifically alleged in the Complaint, led directly to the refusal of the Trial Court to charge the Federal Safety Appliance Act and successively to the affirmance of the judgment of the Trial Court by the Appellate Division, and the refusal of the Court of Appeals to grant leave to appeal.

5. The decisions below do not constitute a departure from the law as interpreted by the Supreme Court of the United States, nor do they constitute interpretations in conflict with what the Court might do if presented with a previously unexplored portion of the law.

This case reflects no more than a result mandated by a fatal disparity between the pleadings and the proof.

Since the facts had been known to the Petitioner for 14 years prior to trial, and had been openly spread on the Record for 11 years prior to the trial, Petitioner's failure, for whatever reason, to condemn in his pleadings the car owned by his employer, must be regarded as a calculated position, not one occurring through surprise.

Under the circumstances, the Trial Court quite properly refused to charge as requested and the affirmance by the Appellate Division was proper.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: January 5, 1966.

All of which is respectfully submited,

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